

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 28Sep2001

Case No.: 2000-INA- 135
CO No.: 1996-CA-09044722/AF

In the Matter of:

Michael Young
Employer,

on behalf of:

Gloria V.D. Gonzalez
Alien.

Appearance: Dan E. Kronenberg, Esq.
Encino, CA

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Burke, Chapman, and Vittone
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Gloria V.D. Gonzalez ("Alien") filed by Michael Young ("Employer") pursuant to § 212 (a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United

States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

Statement of the Case

On July 24, 1995, the Employer, Michael Young, filed an Application for Alien Employment Certification, seeking to fill the position of “Domestic Cook.” The duties for the position were described as:

Plan menus, prepare and cook breakfast, lunch and dinner. He/she will: Peel, wash, trim and prepare vegetables and meats for cooking; broil, fry and roast meats applying knowledge of proper condiments and by blending herbs and spices; do seasonal cooking such as preserving and canning fruits and vegetables; prepare diet foods such as low sodium and low cholesterol; set table properly; prepare meals for special occasions; bake cakes; cookies; maintain kitchen, refrigerator, stove and oven clean at all times; wash dishes, pots and pans; estimate food consumption.

Total hours of employment were listed as 40 hours per week. The daily schedule was split shift, from 8:00 to 12:00 p.m. and 4:00 to 9:00 p.m., with overtime on an as needed basis. The applicant was required to have completed one year of high school and two years of experience as a domestic cook. Employer received four applicant referrals in response to its recruitment efforts. (AF 246-247) One was rejected as uninterested in the position because she could not work the offered schedule. One was rejected as uninterested in the position because the jobsite was too far from her house. One was rejected as uninterested in the position because she could not work the offered schedule and she did not want to work on the weekends. The final applicant was uninterested in the position because she was going out of the country. (AF 247)

On June 13, 1997, the Certifying Officer, Rebecca Marsh Day (CO), issued a Notice of Findings (NOF) in which she advised the Employer of her intent to deny its application. As grounds for this denial, the CO listed three reasons. First, the CO questioned the existence of a *bona fide* job opportunity, clearly open to U.S. workers, stating that the job duties described on the ETA 750 A were not clearly full-time in the context of the Employer’s household, despite Employer’s claim that the alien would be employed 40 hours a week. The CO noted that under immigration law, the number of immigrant visas available to “unskilled workers” is very limited, whereas there is no current waiting period for most immigrant visas in the “skilled workers” category. The CO also questioned whether the job was truly open to U.S. workers, stating that where it appears that the position was newly created for the alien, the employer is in violation of 20 C.F.R. § 656.20 (c)(8). The Employer was asked to

establish that the job did in fact exist, and that the Employer had a job opportunity for a skilled worker, by providing evidence to establish that the position as performed in the Employer's household clearly constitutes full-time employment. The Employer was also required to establish that the job has not merely been created for the alien. (AF 236)

Second, the CO noted that the Employer's job offer involved working a split shift, which was not customary for the occupation of household domestic service worker. Consequently, the CO contended that under 20 C.F.R. § 656.24 (b)(3) employment of the alien would adversely affect both the working conditions and the availability of U.S. workers, since the split shift is not customary for the occupation. The Employer was asked to justify the alien having to work the split shift. (AF 237)

Finally, the CO questioned Employer's ability, under 20 C.F.R. § 656.20 (c)(1), to pay the prevailing wage of \$12.16 per hour for the position of Domestic Cook. The CO requested the Employer to document the ability to hire a full-time cook at the offered wage. The Employer was to submit either recent Form(s) W-2 or 1099 reports of income, most recent income tax return, or a certified financial statement. (AF 238)

On July 17, 1997, the CO received the Employer's Rebuttal information, which included a four page letter and approximately 109 pages of documentation. (AF 118-122; 131-232) The documentation included a seven page declaration answering the five questions presented by the CO in the NOF (AF 112-118), and copies of thirteen alien labor certifications for the position of cook that have already been approved by the U.S. Department of Labor.

The Employer disagreed with the CO's contention that there was no *bona fide* job opportunity, contending that the CO's position that the Employer failed to demonstrate that the position was a full-time one pursuant to 20 C.F.R. § 656.3 was baseless and that reference to the Immigration Act (INMACT) of 1990 was inapplicable.

Responding to the five questions presented in the NOF, the Employer stated that the majority of the cooking had been performed previously either by himself or his wife. Employer stated that the cook would prepare at least three meals a day and about nineteen to twenty meals a week exclusive of special desserts and snacks for the Employer, his wife and his son. The cook would prepare and cook two separate meals, one for the Employer and his wife, and one for the Employer's son. The length of time to prepare a meal varied depending on the type of dish being prepared and whether the cook was preparing breakfast, lunch or dinner. The cook would be employed to prepare the meals from 8:00 a.m. to 12:00 p.m. and from 4:00 p.m. to 9:00 p.m. on Sunday, Tuesday, Wednesday, Friday and Saturday.

According to the Employer, the cook would arrive at 8:00 a.m. to prepare and serve breakfast, which would generally take between one to one and a half hours. After breakfast, the cook would spend time maintaining the kitchen pantries and storage areas as well as estimating the weekly food

consumption and conducting general inventory. The cook would also prepare dessert to be served after dinner. The cook would begin preparation for lunch at 10:30 a.m., which would generally take about one hour. After lunch, the cook would clean the kitchen. Preparation for cooking dinner would begin after the cook prepared and served an afternoon snack to the Employer's son at 4:00 p.m. It generally takes between one and a half to two hours to prepare and cook dinner which is served at about 6:30 p.m.

After dinner, the cook would clean the kitchen and, on one night, assist the Employer in preparing the following week's menu. On Sunday and Wednesday from 7:00 to 8:30 p.m. the cook would prepare and cook meals in advance for Monday and Thursday. The Employer stated that the purpose for hiring the cook was to prepare meals for the family rather than to entertain guests. In addition to these duties, the cook would also purchase the groceries for the entire week. The Employer stated that he is self-employed, working out of his home Monday to Friday; his wife is employed from 9:00 a.m. to 6:00 p.m., Monday to Friday. The Employer's son, who suffers from cerebral palsy and mental retardation, is home the entire day. The Employer tends to the son and takes care of his medical needs during the day and is assisted by his wife when she comes home from work. They both take care of their son on the weekend. The Employer states that he and his wife perform the general household maintenance duties.

The Employer also disagreed with the CO's findings regarding the split shift hours and the Employer's ability to pay a full-time cook. The Employer indicated that the split shift hours are customary to his household's employment of a cook because if the cook worked a normal eight hour day, then there would be no one to serve dinner or to clean the kitchen afterwards. Although the Employer stated that he included his tax returns for 1995 and 1996, which he indicated demonstrated his ability to pay a full-time cook the offered wage of \$12.16 per hour, in fact only the first page of his 1996 tax return was attached. (AF 232)

On August 18, 1999, the CO issued a Final Determination (FD) denying certification, based upon a finding that the Employer failed to establish that there was a full-time job available to which U.S. workers may be referred. The CO noted that it was unclear as to whether the wife ate either breakfast or lunch on Saturday or Sunday or if the son has a snack on Saturday or Sunday. Also, the CO determined that the Employer failed to justify the necessity of the split shift requirement, stating that the Employer had not explained why the cook could not prepare the meals and store them in the refrigerator and at meal time the Employer or his wife could heat and serve. In addition, the CO found that the Employer failed to explain why the cook could not prepare the meals in advance, store them in the refrigerator each day for the Employer or his wife to serve, and clean the kitchen, similar to the arrangement on Monday and Thursdays. The CO also found that the Employer had not clearly established his ability to pay the prevailing wage for the position of Domestic Cook, because the Employer only submitted the first page of his 1996 tax return, and not the entire tax return as the CO requested. (AF 106-111)

On September 16, 1999, the Employer filed a Request for Reconsideration or, in the alternative, a request for administrative review. (AF 33-38) Included with the request for review were the entire income tax returns from the Employer for 1995 and 1996 to show that the Employer does have the ability to pay the offered wage for a full-time Domestic Cook.¹ (AF 43-86) On October 4, 1999, the CO denied the Employer's Request for Reconsideration on grounds that it failed to raise issues which could not have been raised in rebuttal. (AF 32) The Employer made another request for reconsideration on January 27, 2000 (AF 16-17) which was again denied on February 1, 2000 for the same reason. (AF 15) On February 10, 2000, the CO forwarded the file for administrative review.²

Discussion

In the NOF, the CO cited to 20 C.F.R. § 656.3, noting that the Employer had not shown that the job duties described constituted full-time employment in the context of the Employer's household, and to 20 C.F.R. 656.20(c)(8), in noting that it appeared that the position was newly created for the alien. The CO asked that the Employer provide evidence establishing that the position as performed in the Employer's household clearly constitutes full time employment, and was not merely created for the alien. Although the breadth of the information requested by the CO in the NOF suggested that she would consider the totality of the circumstances in determining whether there was a bona fide job opportunity, in fact, in her FD, the CO focused solely on the detailed job description provided by the Employer to determine if the job would occupy the alien full time, concluding that the Employer had not shown that there was a full time job available. In other words, it is clear that the CO did not consider the totality of the circumstances in determining if the Employer established that there was a bona fide job opportunity. *See, Carlos Uy III*, 1997-INA-304.

Here, contrary to the CO's conclusions, we find that the totality of the circumstances does in fact establish that there is a bona fide job opportunity. In response to the CO's questions in the NOF, the Employer provided detailed information about the job duties of the cook, as well as work schedules of the family members. The Employer explained that his son, who stays home during the day, suffers from cerebral palsy and mental retardation, needs constant attention and care, and must be fed a special diet. In addition, the Employer stated that he is restricted to a low sodium diet due to his heart condition. The Employer provided documentation for both his son's and his own medical condition, in the form of letters from physicians, to support these statements. According to the Employer, hiring a

¹ The CO declined to consider this documentation on the motions for reconsideration, and thus we do not consider it in making our determination.

² On November 3, 2000, the Board issued an Order noting that there was no indication that the CO had ruled on the Motion for Reconsideration, and directing the Employer to inform the Board whether it desires a remand to the CO or to proceed with an administrative review. By letter of November 8, 2000, the Employer waived its right to remand and expressed a desire to have the Board proceed with administrative review.

full time cook will free up time for the Employer and his wife to care for their son. Although the CO hinted that the Employer was really seeking a housekeeper or general household worker, by citing to the effects of IMMACT 1990, there is no basis for a conclusion that the Employer is attempting to obtain unskilled household help by describing the position as a skilled domestic cook. Indeed, the split shift nature of the job supports a conclusion that this is a bona fide job opportunity, and not an attempt to certify a worker for unskilled household or childcare work.³ Thus the Employer, who works from home, cares for his son during the weekdays, whether the cook is in the house or not. Indeed, for two days during the work week, the cook will not be working. On the weekdays that the cook does work, she will be off from noon until 4:00 p.m., when she returns to prepare a snack for the son and prepare dinner. The cook also works on the weekend, when both parents are home to care for their son. If the work schedule were for the hours 9:00 a.m. to 5:00 p.m., Monday through Friday, in this particular situation, it would be more reasonable to assume that the Employer was trying to hire unskilled household help. But the fact that the cook's hours are tailored to those times when meals are served to the members of the family, including Saturday and Sunday, lends much credence to the Employer's stated purpose for hiring a cook - that is, to enable him and his wife to attend to their son - and to the bona fide nature of the job opportunity.

The CO also found that it was unclear whether the Employer is able to pay the prevailing wage for the position of domestic cook. The copy of the first page of the Employer's 1996 federal income tax return submitted by the Employer in rebuttal shows a total adjusted gross income of \$137,560.00. While it would have been preferable to have the entire tax return, the information supplied by the Employer shows a substantial income, with no suggestion of extraordinary tax liabilities.⁴ Although the salary for the domestic cook will take a good proportion of the Employer's income, that does not detract from the bona fides of the position. Taken in the context of this particular family situation, where the parents have arranged their schedules to enable them to take care of their disabled son, the use of a domestic cook to relieve them of the additional responsibility of cooking meals appears not be to a luxury, but a necessity. In this particular case, the factual circumstances establish the credibility of

³ The CO also required the Employer to establish the necessity for the split shift hours, noting that a split shift is not customary for the position. In her FD, the CO found that the Employer failed to justify the necessity for this requirement, as he had not explained why the cook could not prepare meals and store them in the refrigerator for the family to heat and serve. The information provided by the Employer shows that the split shift schedule is designed around the times that the family has meals (with the exception of the cook's two week days off). We find that in the context of this particular case, this job requirement bears a reasonable relationship to this particular Employer's situation, and is essential to perform, in a reasonable manner, the job duties as described on the application.

⁴ Had the Employer chosen to provide W-2s or 1099's, options given by the CO, there would be no information on tax liabilities.

the position.⁵ Viewing the totality of the circumstances, the detailed information and supporting documentation provided by the Employer clearly supports a finding that there is a bona fide employment offer clearly open to U.S. workers.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and certification is granted.

Entered at the direction of the panel by:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages.

⁵ The Employer's level of compliance and good faith in the processing of the application also indicates his good faith. Thus, although the Employer initially listed an hourly wage of \$8.50, he amended it immediately on notification from the EDD that the prevailing wage was \$12.80. The Employer considered the four applicants, but rejected them for reasons that were unchallenged by the CO.

Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.